



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 369 OF 2017

THOMAS NDOLO MUKWATE.....CLAIMANT

- VERSUS -

NYALI CHILDREN HOSPITAL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th March, 2022)

JUDGMENT

The claimant filed the memorandum of claim on 10.05.2017 through Koech & Company Advocates. On 23.02.2021 the claimant changed his advocates to Bennette Nzamba & Company Advocates. The claimant claimed one-month salary in lieu of termination notice Kshs. 70,000.00; 12 months' compensation Kshs. 840,000.00; accrued annual leave for 5 years (105 days) Kshs. 245, 000.00; and total claim Kshs. 1, 155, 000.00. The claimant prayed for judgment against the respondent for a declaration the termination was unfair under the Employment Act, 2007; payment of Kshs. 1, 155, 000.00 as claimed; and costs of the suit. The claimant's case is that he was employed by the respondent as Operations and Maintenance Manager on 01.12.2010 and unfairly terminated on 22.03.2017 at a time his monthly salary was Kshs. 70,000.00 per month. His further case is that the termination was unfair because he was not given a valid reason for the termination, he was not heard prior to the termination, he was given no termination notice, he was not paid terminal dues and all in contravention of Article 41 on fair labour practices and the provisions of the Employment Act, 2007.

The respondent filed the response to the claim on 06.07.2017 through Obura J & Company Advocates. The respondent admitted employing the claimant as pleaded for the claimant and at last pay as stated for the claimant. The respondent's case was that the claimant's employment was terminated after the claimant falsely altered records at the respondent's premises. Further, due process was followed, the claimant given an opportunity to defend himself and he gave a written apology and admission of the breach of duties and responsibilities. The respondent denied the claimant's claims and prayed that the claimant's claim be dismissed with costs.

To answer the **1st and 2nd issues**, there is no dispute that parties were in a contract of service and which was terminated by the respondent. The termination was by the letter dated 22.03.2017 on account that in the letter dated 22.02.2017 the claimant admitted altering accounting receipts and daily financial tally of 10.01.2017 to conceal his stealing of Kshs. 7,000.00. The letter stated that theft was a criminal offence and the respondent's management had decided to give the claimant a summary dismissal effective 22.02.2017.

The **3rd issue** for determination is whether the termination was unfair. The claimant's case is that the dismissal related to an alleged refund of Kshs. 7,000.00 on a patient's account by the claimant. The claimant testified that on 11.01.2017 he met a mother to respondent's minor patient. The claimant testified that he was at the front office charged with confirming that the daily collections were in order. He called the cashier known as Brenda and refunded the Kshs. 7,000.00 and the mother to the minor patient signed to acknowledge receipt of the Kshs. 7,000.00. Further, on 21.02.2017 at 06.12pm the respondent's Managing Director (MD) summoned her to explain the refund in writing. He submitted the written explanation the following day and upon delivery of the same to Jane, the Administrative Assistant, she was told to go home. Later on 05.04.2017 she read an email that her letter was ready. She collected the letter on 06.04.2017 being the termination letter dated 22.02.2017.

In cross-examination, the claimant testified that the patient's mother signed for the refund but the remittance advise was not filed or he was not sure if it had been filed. He further testified thus, **"I did not alter the receipt for customer. Daily tally for 10.01.2017 was done by cashier. I did not prepare it. I only balanced the tally. I balanced to reflect the refund of Kshs. 7,000.00. I see receipt No, 57193 dated 10.01.2017. I did not issue the receipt. I indicated by endorsing on the receipt a refund of Kshs.7, 000.00 to the mother of the child. Where I endorsed not filed..."** The claimant further testified that the letter he wrote to explain the discrepancy had not been filed. He denied that the chance to write the letter to explain was a sufficient opportunity to defend himself.

The respondent witness No. 1 (RW1) was Brenda Makwana Sedi, the night shift cashier on 10.01.2017. Her testimony was that she prepared and issued receipt No. 157193. On that 10.01.2017 or 11.01.2017 she had no communication with the claimant. She later found an alteration

of Kshs.7, 000.00 on the receipt but the yellow copy of the receipt with the alteration had not been exhibited. The one filed was the blue copy not showing the alteration. RW1 then reported the discrepancy. In cross-examination she testified that refunds had to be authorised by the MD, the recipient had to acknowledge refund by signing a petty cash voucher and, refunds were not made out of daily collections as had been urged by the claimant. She further testified thus, **“I say no cash was refunded – it was the paperwork on the receipt and day’s tally that had an issue”**

Respondent witness No. 2 (RW2) was Jane Mwendu, the Administrative Assistant. She testified thus, **“Tally of 10.01.2017 and actual cash at hand were different. The difference was cash was less Kshs.7, 000.00. On 11.01.2017 the cashier noted alteration on the tally records. It was Kshs.7, 000.00 less. The Kshs.7, 000.00 was missing in the cash box. Cashier put money in an envelope for day’s collection (at end of shift) to present to me. I say cashier placed cash in enclosed envelope and put it in cash box. On 11.01.2017 I opened cash box and the envelop and found Kshs.151, 543.00 instead of Kshs.158, 543.00. The discrepancy was Kshs.7, 000.00. On the same day (19.01.2017) RW1 said she had received Kshs.7, 000.00 by Mpesa. She had submitted Kshs. 158, 543.00 in her shift for 10.01. 2017.On 11.01.2017 RW1 was preparing tallying for 11.01.2017 and noticed tallying for 10.01.2017 had been altered. There was a patient on discharge who had paid Kshs. 152, 536.00 in cash but alteration indicated the patient paid Kshs.7, 000.00 by Mpesa and difference in cash. Payment by Mpesa was not true. The claimant was terminated because he altered the receipt and tally for 10.01.2017.”**

RW2 further testified that there was no patient on 10.01.2017 who came to demand a refund of Kshs.7, 000.00 allegedly paid by Mpesa. RW2 further testified that it was RW1 and RW2 who were authorised to deal with cash and not the claimant as was suggested and urged for the claimant.

The Court has considered the evidence. It is parties’ shared testimony that on 21.02.2017 the MD summoned the claimant and asked him to explain the discrepancy in the records concerning the Kshs. 7, 000.00. It is also shared evidence for the parties that the claimant wrote to explain that discrepancy. The respondent dismissed the claimant because in his written response of 22.02.2017 he admitted the allegations as had been levelled. The claimant’s letter of response was not filed but in his evidence the claimant does not attack the letter of summary dismissal on account that it was misleading in stating that he had admitted the allegations. The Court finds that on a balance of probability, by that letter of response of 22.02.2017, the claimant admitted the allegations. Further, with such admission, a further administrative hearing of the matter between the parties would be superfluous and it cannot be found that the respondent invoked unfair procedure or failed to comply with section 41 of the Employment Act, 2007 on notice and hearing. It cannot therefore be found that the respondent adopted an unfair procedure in terminating the claimant’s employment.

Even if the claimant had not admitted, the Court finds that as at the time of the termination, the respondent has shown that the reason for termination was valid and genuine as per section 43 of the Act. In particular, the claimant confirmed that by an endorsement he altered the receipt and further that he had no evidence of the alleged patient’s mother receiving the Kshs.7, 000.00 on 10.01.2017. That evidence tallies with that of RW2 and RW1 that the records had been altered and Kshs. 7, 000.00 was missing in unexplained manner. The Court finds that the claimant fully contributed to his summary dismissal, the reason related to his conduct, compatibility and the respondent’s operational requirements per section 45 of the Act. He altered records without due authority and in the process Kshs. 7, 000.00 went missing. The claimant is undeserving of compensation under section 49 of the Act. Further, as submitted for the respondent, under section 44 of the Act, the respondent was entitled to dismiss with lesser notice or no notice on account of the established gross misconduct and the claim for pay in lieu of the termination notice will collapse.

As submitted for the respondent, the claim for leave pay was settled by the consent order of 18.02.2020 that the respondent was to pay a sum of Kshs. 111, 557.00 within 48 hours and on account of the outstanding leave days.

The Court has considered that the claimant succeeded on the claim for leave but resolved by the consent order. Taking all circumstances of the case into account, the respondent will pay partial costs of the suit fixed at 25% of the full costs.

In conclusion and in view of the consent judgment recorded on 18.02.2020, the suit is hereby determined with orders the respondent to pay 25% of the costs of the suit within 45 days of determination of the quantum thereof and failing, interest at Court rates to be payable thereon from the date of such determination till full payment.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH MARCH, 2022.

BYRAM ONGAYA

JUDGE